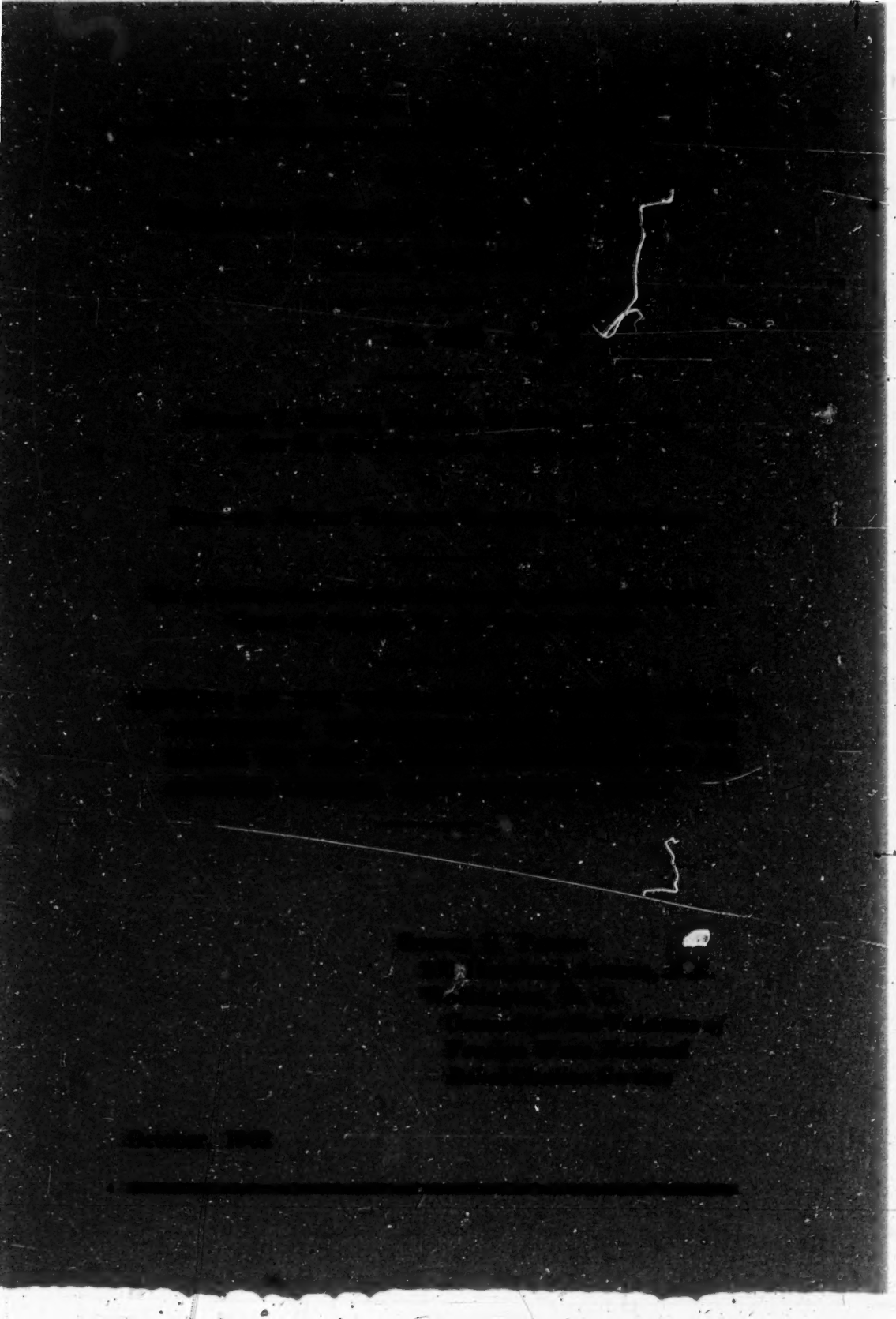

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 664

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. MCCLEARN, JR., *Petitioners*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE VETERANS OF FOREIGN WARS NATIONAL REHABILITATION SERVICE FOR LEAVE TO FILE A BRIEF ON THE MERITS AS AMICUS CURIAE, AND ANNEXED BRIEF

The Veterans of Foreign Wars National Rehabilitation Service respectfully moves the Court for leave to file the annexed brief amicus curiae on the merits of the petition for a writ of certiorari by Tilton et al. The Veterans of Foreign Wars National Rehabilitation Service obtained the consent of the Department of Justice representing the petitioners. However, consent of the attorney for the

respondent Missouri Pacific Railroad Company was requested but refused.

I

The Veterans of Foreign Wars of the United States is an organization of overseas war veterans founded in 1899 and chartered by The Congress May 28, 1936. The National Rehabilitation Service of the Veterans of Foreign Wars assists veterans and their widows and orphans with their legal entitlements and restoration to the fullest physical, mental, social, vocational, and economic potential of which they are capable. Our 1,300,000 members participate in this effort at all levels of our organization. Many of our members and other veterans have been called to the colors twice and may proudly serve again. Inasmuch as employment is the key to rehabilitation our interest in this case is profound and continuing. As set forth, infra, The National Rehabilitation Service of The Veterans of Foreign Wars, acting on behalf of itself, our members and all veterans protested to the Bureau of Reemployment Rights of the Labor Department in behalf of Tilton et al. The National Rehabilitation Service of The Veterans of Foreign Wars did not participate in the proceedings in the court below only because it was unaware that such proceedings were in progress until it was too late to intervene therein.

II

The questions presented by the petition for certiorari in this case are of vital importance to the veterans of our Nation, our own members, the battlefield combat effectiveness of our soldiery and the economic well being of our country. The practical effect of the decision below is to penalize Tilton et al. for serving their country during the Korean Conflict. This decision impairs our efforts to rehabilitate veterans by restoration to former employment.

Worse, it spreads amongst veterans the feeling of betrayal by those for whom we fought. This was not the intent of The Congress or The Supreme Court in cases cited, infra.

III

WHEREFORE, The National Rehabilitation Service of the Veterans of Foreign Wars moves the Court for leave to file the brief annexed hereto on the merits of the questions raised by the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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No. 664

DONALD I. TILTON, WILFRED L. BECK, JR., AND GUY H. MCCLEARN, JR., *Petitioners*

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MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE VETERANS OF FOREIGN WARS NATIONAL REHABILITATION SERVICE AS AMICUS CURIAE

The Veterans of Foreign Wars National Rehabilitation Service submits this brief as amicus curiae in support of Tilton et al. to reverse a final judgment of the United States Court of Appeals for the Eighth Circuit entered August 17, 1962. That court had held that a Korean Conflict veteran, Tilton, and others had no reemployment rights under the provisions of the Universal Military Training and Service Act of 1951, 64 Stat. 614, as amended, 50 USC App. 459.

THE INTEREST OF THE VETERANS OF FOREIGN WARS REHABILITATION SERVICE

This petitioner agrees that the statement of facts, questions presented, and basis of jurisdiction are correct and are not fully repeated herein. This veteran organization, representing veterans of foreign wars has a continuing concern with the application of all laws effecting justice to veterans, their widows, and orphans. Veterans of four wars are members of our organization plus many from the fighting in Vietnam. Accordingly, we always seek effective rehabilitation for the ex-combatant in his readjustment to civilian life.

ARGUMENT

The combat effectiveness of the soldier is impaired when he worries about his job back home being taken by those who are not serving in uniform, or about the fact that he may have to surrender some of the elements of tenure which enable him to be restored to his gainful employment. The American soldier must compete on the battlefield against enemies whose position is acually enhanced economically and financially by service in their forces. The Congress recognized this problem (50 U.S.C. App., Sec. 459). Battlefield commanders have long realized that the fighting man's morale should not be shaken by jeopardizing his family, his home, or his job. This is the principal reason why we are here, i.e. to assure that the American combatant should not be disadvantaged when he must serve in the armed forces to defend the nation, including those remaining at home who have displaced him in his employent. Our people must be able to fight for our country without concern lest they be discriminated against for having performed this vitally necessary service in behalf of our Nation. The recent call-up of tens of thousands of persons from civilian employment over the Cuban crisis, the President's statement of the obvious

need for further increases in our conventional armed forces, evidences the plain fact that there is no foreseeable end to the need for us to maintain a large military establishment. In F.Y. 1963 650,000 Americans were discharged from the Armed Forces; in F.Y. 1964 the discharge of 600,000 is contemplated. Several thousand have been called to the colors twice. This transfer in the movement of large numbers of servicemen from civilian employment to the armed forces and back makes it manifestly urgent that we protect the veterans in their civilian employment as a major factor in the country's security. Indeed, our ability to respond to any Communist engendered crisis must be so facile that it does not tire or cause impatience that would result in an impetuous or frustrated decision to war by miscalculation. Accordingly, the less anxiety and anguish experienced in this important transfer from mufti to uniform and back again makes this case one of grave importance. We agree with Mr. Justice Frankfurter in *McKinney* v. *Mo., Kans., and Tex. R.R.*, 375 U.S. 265 (1958) when he stated "He is not to be disadvantaged for serving his country." We cannot, however, reconcile the obiter dicta in the rest of this case with this statement.

The issue in this case is whether Tilton, after having met the requirements for a promotion subsequent to his return from the military service, should have his seniority kept even on the escalator with those who remained in civilian employent of the respondent.

Tilton was originally employed by the respondent July 13, 1949. On April 10, 1950, he entered military service and was released December 23, 1951. On January 2, 1952, he returned to work for the respondent. He completed the required 1040 day "apprenticeship" August 27, 1956. August 28, 1956, Tilton was designated that date as his seniority date on the carman's roster. While Tilton was in military service, 29 non-veteran carhelpers accrued days

of credit toward their 1040 day work objective. Inasmuch as Tilton was in the military service, these previously junior non-veterans proceeded ahead of him on the carman's seniority roster. The escalator rule announced in the Diehl and Oakley cases has not been departed from in any other decision of this Court. The opinion in the Court of Appeals below cited a series of cases to establish an irrelevant "development of proficiency" rule e.g., *Altgens* v. *Associated Press*, 5 Cir., 1951, 188 F 2nd 727, 729.

Tilton actually performed the 1040 day work requirement *plus* his military time. Must he now forfeit the time during the Korean Conflict despite the fact that he has actually served more than the 1040 days requirement in the first place? If the Court has always held the veteran entitled to such seniority credit, despite the contrary decisions below, and in other Circuit Courts, it is apparent that the veteran is not asking for super seniority in this case but merely a telescoping of time. The reversal per curiam by the Supreme Court in *Diehl* v. *Lehigh Valley R.R.*, 1955 348 U.S. 960 requires this result. If he had not performed the 1040 days of apprenticeship and would be seeking to count days of military service as constituting apprenticeship days to make-up the 1040 days, a different question would be involved. Therefore, inasmuch as Tilton performed his 1040 days of apprenticeship, his seniority should be just as if the Korean Conflict had never happened or had merely delayed his completion of apprenticeship. To do otherwise would penalize him for having served during the Korean Conflict.

CONCLUSION

As amicus curiae the Veterans of Foreign Wars of the United States of America National Rehabilitation Service prays that the petition be granted, and that the decision

below be reversed, and petitioners' seniority be computed as if he had remained continuously in the respondent's employ.

Respectfully Submitted,

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